IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DAWN J., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, KAYLA J., and ASHLEY J., Appellees.	2 CA-JV 2007-0054 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD-200500098

Honorable Joseph R. Georgini, Judge

AFFIRMED

Richard Scherb
Florence
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By William V. Hornung
Tucson
Attorneys for Appellee Arizona
Department of Economic Security

H O W A R D, Presiding Judge.

¶1 Appellant Dawn J. appeals from the juvenile court's order of July 11, 2007, terminating her parental rights to her then-eight-year-old daughter, Kayla, and her six-year-

old daughter, Ashley.[1] Dawn contends the juvenile court erred in finding that (1) the Arizona Department of Economic Security (ADES) had made diligent efforts to provide services designed to reunite her with Kayla and Ashley and (2) termination of her parental rights was in her daughters' best interests. We affirm.

¶2 Viewed in the light most favorable to affirming the juvenile court's findings, *see In re Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994), the record establishes the following. On May 23, 2005, ADES received a report that physicians were unwilling to discharge Dawn's son, Jacob, from the hospital because of concerns about Dawn's ability to care for him and the condition of the family home. Jacob is described as a "medically fragile" child who has cardiac, pulmonary, gastrointestinal, and renal abnormalities. By May 2005, he had already had several open-heart surgeries and required special care, including use of a gastrostomy feeding tube. According to the report, Dawn had at times left Jacob, Kayla, and Ashley in the care of a fifteen-year-old child for more than a day at a time, and there was often no food in the home.

¶3 Upon investigation, the Child Protective Services (CPS) division of ADES found the home cluttered, dirty, and in disrepair, with broken windows and cabinets secured by duct tape. Jacob's medical equipment was "sticky and dirty," and there was limited food in the home. Dawn was unemployed, behind in her rent, at risk of losing utility service, and without transportation. She admitted she used methamphetamine "to lose weight," and she

[1]The juvenile court's order also terminated Dawn's rights to her five-year-old son, Jacob. Dawn signed a consent to place Jacob for adoption on September 13, 2006, and does not appeal from the termination of her parental rights to him.

was involved with a man who admitted using methamphetamine and other illegal drugs. She is divorced from the children's father, William J., who is currently serving a prison term for having molested Kayla.[2]

¶4 Shortly after its investigation, CPS took temporary custody of Jacob and placed him with a foster parent trained to care for children with developmental disabilities. CPS did not take custody of Kayla and Ashley at that time but offered services designed to avert the need to remove the girls from the home. *See* A.R.S. § 8-821(D). These services included comprehensive, "wrap-around" case management and intensive in-home counseling; assistance with parenting, budgeting, food, and household needs; a housing subsidy;[3] a psychological evaluation; counseling and parenting services; day care; substance abuse counseling; and random urinalyses.

¶5 On May 31, 2005, ADES filed a dependency petition seeking to have all three children adjudicated dependent and placed in the custody of ADES. In its petition, ADES alleged that, as to Kayla and Ashley, continuation of their in-home placement would be contingent on "participation by the family in services, monitoring by CPS and the Court," and on Dawn's ability to remedy her neglect of the children, her inability to maintain a proper home for them, and her substance abuse. ADES prepared a case plan identifying the

---

[2]The motion for termination of parental rights also sought to terminate William's parental rights to the children. William did not contest the motion.

[3]Many of these "wrap-around" services, as well as health care services to instruct Dawn about Jacob's home-care needs, had also been provided to Dawn previously, from the end of 2004 until April 2005. Dawn had voluntarily participated in these services after ADES had investigated a report in October 2004 that the children had been neglected.

tasks Dawn was expected to accomplish and the supportive services ADES would provide to help her meet the goal of family reunification.

¶6 In August 2005, after Dawn tested positive for methamphetamine use, CPS took physical custody of Kayla and Ashley, and the juvenile court granted ADES's motion to change physical custody of the girls to Paul and Donna L., their maternal grandparents. Dawn did not contest the issue of dependency, and, on September 27, 2005, the juvenile court adjudicated all three children dependent.

¶7 After Kayla and Ashley were removed from Dawn's care, ADES continued to offer services to Dawn, including individual, family, and substance abuse counseling; random urinalyses; parenting classes; visitation; and transportation. At a dependency review hearing in January 2006, however, the juvenile court found that, despite these reasonable efforts by ADES to facilitate Dawn's reunification with her daughters, Dawn had "not been compliant with all case plan tasks."

¶8 According to reports prepared by the assigned CPS case manager, Velma Estrada, Kayla and Ashley had done well in their placement with their grandparents, and Dawn's sister, Sarah L., had moved to her parents' home to help care for the children in November 2005. In June 2006, after Paul and Donna had told Estrada they would soon be relocating and could not continue as custodians for Kayla and Ashley, the juvenile court granted ADES's motion to transfer the girls' physical custody to Sarah, who continued to live in her parents' home after they had moved. Thus, when physical custody was transferred to Sarah, Kayla and Ashley remained in the same home and community.

¶9 In a July 2006 report prepared for the children's permanency hearing, Estrada wrote that Dawn had "made minimal effort in achieving her case plan goals." According to Estrada, Dawn had repeatedly canceled visitation with Kayla and Ashley because of "work schedule and transportation problems" but continued to miss the appointments even after she was provided transportation and her work schedule was accommodated. The agency assigned to provide Dawn with transportation had ultimately canceled its services "for no show." Similarly, Estrada reported that Dawn had attended only four of eleven sessions for individual and substance abuse counseling scheduled during February, March, and April 2006 with psychiatric social worker Donna Davis and had stopped attending the sessions altogether in May, resulting in a termination of the services. During June 2006, Dawn "dropped out of sight," providing no address or telephone number to Estrada, Davis, or her children. Although Dawn's case plan required her to participate in random urinalysis twice each week, she had missed most of the scheduled testing from February through July 2006. Dawn had been referred to parenting classes in January 2006 but had failed to complete them. And, at the time of Estrada's July report, Dawn was unemployed and homeless.

¶10 At the combined dependency review and permanency hearing held on August 2, 2006, the juvenile court changed the case plan from reunification to severance and adoption. ADES subsequently filed a motion to terminate Dawn's parental rights on the statutory ground of neglect or abuse pursuant to A.R.S. § 8-533(B)(2). On January 10, 2007, the juvenile court granted ADES leave to amend the motion to allege the following, additional grounds: Dawn was unable to discharge parental responsibilities because of

mental illness, mental deficiency, or a history of chronic abuse of dangerous drugs, controlled substances, or alcohol that was reasonably expected to continue for a prolonged, indeterminate period, *see* § 8-533(B)(3); Kayla and Ashley had been placed out of the home for nine months or longer pursuant to court order, and Dawn had substantially neglected or willfully refused to remedy the circumstances that caused them to remain in care, *see* § 8-533(B)(8)(a); and Dawn had been unable to remedy the circumstances that caused her daughters to remain out of the home for fifteen months or longer, and there existed a substantial likelihood that she would be unable to parent adequately in the near future, *see* § 8-533(B)(8)(b). Perhaps because ADES's motion for leave to amend characterized these grounds as "add[itional] allegations," the amended motion did not include the ground of neglect or abuse under § 8-533(B)(2) alleged in the original motion.

¶11 A four-day termination hearing was held in January 2007. At the hearing, Estrada testified that, although Dawn's participation in substance abuse counseling, individual counseling, parenting classes, and visitation had been very sporadic over the history of her case plan, her compliance with some case plan tasks had improved since the August 2006 permanency hearing. Dawn had completed parenting classes in October 2006, had attended counseling sessions with a new counselor, and had participated more regularly in visitation with Kayla and Ashley. Parent Aide Leticia Martinez also testified that, since October 2006, Dawn had been "very consistent" in appearing for scheduled visitations.

¶12 Estrada reported that Dawn had still failed to comply with random urinalysis, however, and had not completed or continued substance abuse counseling. Although Dawn

had called CPS regularly to determine whether random urinalysis would be required on a particular day, she had actually complied with testing on only seventeen of ninety-six scheduled test days during 2006 and had provided no samples for testing since September 2006.

¶13 Helen Mack, a therapist who had provided "wrap-around" services to the family before Jacob's removal from the home in May 2005 and had continued counseling Kayla and Ashley since then, testified that Dawn had "been the most stable she has been for quite some time" during the six months prior to the termination hearing. Nonetheless, Mack stated that Dawn was still unable to care for Kayla and Ashley, that she did not foresee Dawn's being able to parent independently in the near future, and that the children could not be expected to thrive if returned to Dawn's care. Mack believed the children's best interests would be served by continued placement with Sarah, whom Mack described as providing "support and good parenting" in the context of a "loving, nurturing relationship."

¶14 Sarah testified that she could provide the stable environment Kayla and Ashley needed and that they were happy with her. She expressed both her opinion that termination of Dawn's parental rights was in the girls' best interests and her willingness to adopt them if they became available for adoption.

¶15 At the close of the hearing, the juvenile court orally ruled that ADES had established all grounds alleged in the original and amended motions and that terminating Dawn's parental rights was in the best interests of Kayla and Ashley. However, the juvenile court's signed minute entry, as well as its formal findings of fact, conclusions of law, and

order, based the termination of Dawn's rights only on the ground of fifteen-month, out-of-home placement under § 8-533(B)(8)(b) and the finding that Dawn had "neglected and/or willfully failed to protect" the children, without citation of § 8-533(B)(2).

Grounds for Termination

¶16 The juvenile court, as the trier of fact in a severance proceeding, is in the best position "to weigh evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). We do not reweigh the evidence, *see Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927 (App. 2005), and will affirm a termination order unless no reasonable evidence supports it and the order is clearly erroneous. *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997).

¶17 Section 8-533(B)(8)(b) provides for termination of parental rights when, despite the responsible agency's "diligent effort to provide appropriate reunification services,"

> the child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order . . . , the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

¶18 Dawn does not dispute the adequacy of the reunification services ADES provided her. And, as ADES points out, Dawn does not challenge the juvenile court's

findings that she had neglected the children and had been unable to remedy the circumstances that caused their removal from the home or its finding that there was a substantial likelihood she would not be capable of parenting effectively in the near future.[4] Rather, Dawn contends ADES failed to make reasonable reunification efforts because she was not afforded "sufficient time to improve her ability to care for her children" in light of her "significant progress and effort . . . during the five to six months prior to [the] date of the severance." She relies on *Mary Ellen C. v. Arizona Department of Economic Security*, 193 Ariz. 185, ¶ 37, 971 P.2d 1046, 1053 (App. 1999), for the proposition that ADES "must provide a parent with the time and opportunity to participate in programs designed to improve the parent's ability to care for the child" in order to meet its constitutional obligation to provide appropriate reunification services. *Id*.

¶19 Besides disputing the merits of Dawn's claim, ADES suggests that, because *Mary Ellen C.* involved termination of parental rights based on a parent's mental illness under § 8-533(B)(3), *see Mary Ellen C.*, 193 Ariz. 185, ¶ 12, 971 P.2d at 1049, it fails to "establish[] the nature of ADES's duty, if any," when a parent is alleged to have "neglected and/or willfully failed to protect" the children. Therefore, ADES argues, we should affirm

---

[4]Although the juvenile court found that Dawn had "neglected and/or willfully failed to protect" Kayla and Ashley, willful failure to protect a child is not a ground for termination of parental rights. *See* § 8-533(B)(2) (termination justified by finding that parent "has neglected or wilfully abused a child"); § 8-201(2) (defining abuse). We therefore regard Dawn's failure to challenge this finding as a concession that the court correctly found she had neglected the children. *See Britz v. Kinsvater*, 87 Ariz. 385, 388, 351 P.2d 986, 987 (1960) (when "trial court's findings of fact are not . . . challenged [on] appeal, [this court] may assume that their accuracy is conceded").

the juvenile court's termination order on the ground of neglect pursuant to § 8-533(B)(2) without addressing the § 8-533(B)(8) time-in-care ground or whether ADES made sufficient efforts to reunify the family. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000) (single statutory ground sufficient to support termination).

¶20 In *Mary Ellen C.*, Division One of this court held that, even though § 8-533(B)(3) does not expressly require ADES to provide reunification services, as a constitutional matter the state must "make reasonable efforts to preserve the family" or establish that such efforts would be futile before a parent's rights are terminated. 193 Ariz. 185, ¶¶ 30, 32, 34, 971 P.2d at 1052-53. Although *Mary Ellen C.* involved a parent who was allegedly unable to parent as a result of mental illness, *see* § 8-533(B)(3), the court's language was broad:

> [O]ur courts have defined [the state's duty to make reasonable efforts to preserve the family] on constitutional grounds as a necessary element of *any* state attempt to overcome what the United States Supreme Court has described as the "fundamental liberty interest of the natural parents in the care, custody and management of their child." *Santosky v. Kramer*, 455 U.S. [745,] 753, 102 S.Ct. 1388[, 1394-95 (1982)] . . . .
>
> . . . .
>
> Arizona courts have long required the State, in mental-illness-based severances, *as in others*, to demonstrate that it has made a reasonable effort to preserve the family. . . .
>
> . . . .
>
> [B]ecause *fundamental interests are no less involved in mental-illness-based severances than in others*, the principle is no less applicable in mental-illness-based severances than in others that "termination of the parent-child relationship should

> not be considered a panacea but should be resorted to only when concerted effort to preserve the relationship fails." *Department of Economic Sec. v. Mahoney*, 24 Ariz. App. 534, 537, 540 P.2d 153, 156 (1975).

Mary Ellen C., 193 Ariz. 185, ¶¶ 32-34, 971 P.2d at 1053 (emphasis added).

¶21 Beyond its suggestion that this case is distinguished from *Mary Ellen C.* because different statutory grounds were implicated there, ADES has provided no reasoned basis to exclude terminations of parental rights sought under § 8-533(B)(2) from the constitutional requirement *Mary Ellen C.* addressed. *Cf. James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, ¶¶ 8-9, 106 P.3d 327, 328-29 (App. 2005) (reunification services futile and therefore not required under *Mary Ellen C.* when termination based on length of sentence, § 8-533(B)(4); prolonged incarceration not subject to amelioration through reunification services); *Toni W. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 61, ¶¶ 14-15, 993 P.2d 462, 467 (App. 1999) (mother had abandoned child at birth; no constitutional right to reunification services under *Mary Ellen C.* in absence of existing parent-child relationship). We need not reach this issue to address Dawn's appeal and decline to do so. *Cf. State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim."); *see also* Ariz. R. Civ. App. P. 13(b)(1) (brief of appellee must conform to same requirements); Ariz. R. P. Juv. Ct. 91(A) (Rule 13, Ariz. R. Civ. App. P., "appl[ies] in appeals from final orders of the juvenile court").

¶22 Assuming, then, that *Mary Ellen C.* requires ADES to make reasonable efforts to preserve the family whether the ground for termination of parental rights is § 8-533(B)(2) or § 8-533(B)(8), we find no error in the juvenile court's finding that ADES met that obligation in this case. In *Mary Ellen C.*, the court noted that CPS had offered "no significant reunification services for almost a year" after removing a child from her mother's care and "waited more than a year after removing the child before referring a mother with a serious mental illness for a psychological evaluation." 193 Ariz. 185, ¶ 35, 971 P.2d at 1053. After the psychological evaluation suggested the mother needed intensive mental health services and a psychiatric evaluation, CPS delayed another three months before it gave the mother a telephone number to a mental-health provider and encouraged her to self-refer; CPS then "never followed up sufficiently to secure . . . records of her progress" before ADES petitioned for termination of parental rights. *Id*. Here, CPS did not delay in providing reunification services to Dawn. In fact, it had been providing extensive services to Dawn and her family even before Jacob was removed from the home in May 2005, giving her ample "time and opportunity," *id*. ¶ 37, to remedy the circumstances that necessitated the children's removal. We will not charge ADES with responsibility for Dawn's delay in taking advantage of the many services CPS offered.

¶23 We cannot agree with Dawn that her recent compliance with visitation and her completion of a parenting class warranted prolonging her daughters' dependency status and delaying permanency, particularly when Dawn had never consistently complied with other case plan requirements, including random urinalysis. *See In re Maricopa County Juv.*

Action Nos. JS-4118/JD-529, 134 Ariz. 407, 409-10, 656 P.2d 1268, 1270-71 (App. 1982) (at some point "trial court must decide whether the natural parent is making a good-faith effort to reunite the family"; "token efforts" will not preclude severance); *cf. In re Maricopa County Juv. Action No. JS-501568*, 177 Ariz. 571, 576-77, 869 P.2d 1224, 1229-30 (App. 1994) (despite parent's belated progress before termination hearing, termination proper under § 8-533(B)(8)(a)). Substantial evidence in the record supports the juvenile court's finding that ADES was diligent in providing appropriate reunification services here.

Best Interests

¶24 On the issue of the best interests of the children, the question before us is whether reasonable evidence supported the juvenile court's finding, by a preponderance of the evidence, that the children "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *See Oscar O.*, 209 Ariz. 332 , ¶ 6, 100 P.3d at 945; *see also Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005) (preponderance standard of proof applies to best-interests analysis). Dawn maintains ADES "neither proved that the children would benefit from the severance, nor that they would be harmed by the continuation of the relationship." But "a current adoptive plan is one well-recognized example" of a benefit derived from termination of parental rights. *Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d at 945 (collecting cases). "In combination, the existence of a statutory ground for severance and the immediate availability of a suitable adoptive placement for the children frequently are sufficient to support a severance order." *Id*. ¶ 8. A juvenile court may also consider whether the children's existing placement is meeting their

needs. *Audra T. v. Ariz. Dep't of Econ. Sec.* , 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1998).

¶25 Here, evidence at the termination hearing established, as benefits of severance, that Kayla and Ashley are living together with an aunt who is meeting all of their needs and who wishes, and is fit, to adopt them. The juvenile court did not err in finding that termination of Dawn's parental rights was in the best interests of the children.

Conclusion

¶26 The record contains reasonable evidence to sustain the juvenile court's findings that ADES made a diligent effort to provide Dawn with appropriate reunification services, as required by § 8-533(B)(8) and *Mary Ellen C.*, and that termination of Dawn's parental rights to Kayla and Ashley is in the best interests of the children. For those reasons, and because Dawn did not challenge the juvenile court's finding of neglect under § 8-533(B)(2), we affirm the court's termination order.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge